

UNITED STATES DISTRICT COURT **Jan 25, 2019**
EASTERN DISTRICT OF WASHINGTON SEAN F. McAVOY, CLERK

WALTER LAWRENCE G.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No. 2:17-CV-00383-SMJ

**ORDER RULING ON CROSS-
MOTIONS FOR SUMMARY
JUDGMENT**

Before the Court, without oral argument, are the parties' cross-motions for summary judgment, ECF Nos. 12 & 13. Plaintiff appeals the Administrative Law Judge's ("ALJ") denial of his application for social security benefits. ECF No. 3. Plaintiff argues the ALJ erred in (1) assessing Plaintiff's claims about the severity of his symptoms and (2) weighing the opinion of Plaintiff's examining psychologist. The Commissioner of the Social Security Administration asks the Court to affirm the ALJ's decision. ECF No. 8.

After reviewing the record and relevant legal authorities, the Court is fully informed. For the reasons set forth below, the Court affirms the ALJ's decision and therefore denies Plaintiff's motion and grants the Commissioner's motion.

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1 **I. BACKGROUND¹**

2 On February 6, 2014, Plaintiff applied for Supplemental Security Income,
3 alleging disability beginning December 1, 2007. AR² 18. The Administration
4 denied the claims initially and upon reconsideration, and Plaintiff requested a
5 hearing. AR 18. ALJ Marie Palachuk presided over a hearing in Spokane,
6 Washington on December 1, 2016. AR 18. The ALJ issued a decision unfavorable
7 to Plaintiff. AR 15–28. The Appeals Council denied Plaintiff’s request for review.
8 AR 1.

9 **II. ALJ FINDINGS³**

10 At step one, the ALJ found Plaintiff has not engaged in substantial gainful
11 activity since February 6, 2014. AR 20. At step two, the ALJ found Plaintiff has the
12 following severe impairments: non-ischemic cardiomyopathy (status post repair of
13 the ascending aorta), morbid obesity (body mass index 46), chronic obstructive
14 pulmonary disease, and hypertension. AR 20. At step three, the ALJ found
15 Plaintiff’s impairments do not meet or medically equal the severity of a listed
16 impairment. AR 23. At step four, the ALJ found Plaintiff has the residual functional

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18 ¹ The facts are only briefly summarized. Detailed facts are contained in the
administrative hearing transcript, the ALJ’s decision, and the parties’ briefs.

19 ² For ease and consistency with the parties’ briefs, the Court cites to the consecutive
pagination of the administrative record, which appears at ECF No. 9.

20 ³ The applicable five-step disability determination process is set forth in the ALJ’s
decision, AR 19–20, and the Court presumes the parties are well acquainted with
that standard. Accordingly, the Court does not restate the five-step process here.

1 capacity to perform light work with certain limitations. AR 23. Further, at step four,
2 the ALJ found Plaintiff is unable to perform any past relevant work. AR 26. Finally,
3 at step five, the ALJ found jobs exist in significant numbers in the national economy
4 that Plaintiff can perform considering his age, education, work experience, and
5 residual functional capacity. AR 26. Accordingly, the ALJ determined Plaintiff was
6 not disabled, as defined by the Social Security Act, since February 6, 2014. AR 27.

7 **III. STANDARD OF REVIEW**

8 The Court must uphold an ALJ's determination that a claimant is not disabled
9 if the ALJ applied the proper legal standards and there is substantial evidence in the
10 record as a whole to support the decision. *Molina v. Astrue*, 674 F.3d 1104, 1110
11 (9th Cir. 2012) (citing *Stone v. Heckler*, 761 F.2d 530, 531 (9th Cir. 1985)).
12 "Substantial evidence 'means such relevant evidence as a reasonable mind might
13 accept as adequate to support a conclusion.'" *Id.* (quoting *Valentine v. Comm'r Soc.*
14 *Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009)). This must be more than a mere
15 scintilla but may be less than a preponderance. *Id.* at 1110–11. Even where the
16 evidence supports more than one rational interpretation, the Court must uphold an
17 ALJ's decision if it is supported by inferences reasonably drawn from the record.
18 *Id.*; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).

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IV. ANALYSIS

A. The ALJ reasonably assessed Plaintiff's claims about the severity of his symptoms.

Plaintiff testified he has poor stamina, weakness, fatigue, and difficulty breathing, which limits his ability to walk, stand, lift, and carry. AR 49–54. Plaintiff testified that, during two periods of at least a month, he stopped taking his prescribed medications when he lost his insurance coverage. AR 53–54, 56. Plaintiff testified his symptoms worsened when he did not take his prescribed medications. AR 54. Plaintiff testified his breathing improved since he quit smoking but he still has trouble breathing with exertion. AR 50.

The ALJ found Plaintiff's "medically determinable impairments could reasonably be expected to cause the alleged symptoms" but his "statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record." AR 24. In reviewing the record, the ALJ noted Plaintiff's condition improved with proper medication and smoking cessation. *See* AR 24.

Where a claimant presents objective medical evidence of an underlying impairment that could reasonably be expected to produce the symptoms alleged, and there is no evidence of malingering, an ALJ "must give specific, clear and convincing reasons in order to reject the claimant's testimony about the severity of the symptoms." *Diedrich v. Berryhill*, 874 F.3d 634, 641 (9th Cir. 2017) (quoting

1 *Molina*, 674 F.3d at 1112). A finding that the claimant’s testimony is not credible
2 must be sufficiently specific to allow the Court to conclude the ALJ rejected it on
3 permissible grounds and did not discredit it arbitrarily. *See Brown-Hunter v. Colvin*,
4 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*, 947 F.2d 341, 345–
5 46 (9th Cir. 1991)). “General findings are insufficient; rather, the ALJ must identify
6 what testimony is not credible and what evidence undermines the claimant’s
7 complaints.” *Id.* (quoting *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)).

8 Plaintiff argues the ALJ erred in assessing his claims about the severity of his
9 symptoms. ECF No. 12 at 8–11. First, Plaintiff argues the ALJ “evidently”
10 discredited his symptom claims based on his historical failure to take his
11 medications while overlooking his testimony that he only did so when he lost his
12 insurance.⁴ *Id.* at 10. Second, Plaintiff argues the ALJ “implied” his prior smoking
13 habit discredited his symptom claims.⁵ *Id.* at 9–10.

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15 ⁴ The Ninth Circuit “proscribe[s] the rejection of a claimant’s complaints for lack
16 of treatment when the record establishes that the claimant could not afford it.”
17 *Regennitter v. Comm’r of Soc. Sec. Admin.*, 166 F.3d 1294, 1297 (9th Cir. 1999).
18 But as explained above, the ALJ did not use Plaintiff’s historical failure to take his
19 medications to discredit his symptom claims. Therefore, the reason why Plaintiff
20 previously stopped taking his medications was irrelevant and the ALJ’s failure to
incorporate it into her decision was not error or was harmless.

⁵ It is uncertain whether the Ninth Circuit prohibits citing to a claimant’s continued
smoking as adversely impacting his or her credibility. *See Bray v. Comm’r of Soc.*
Sec. Admin., 554 F.3d 1219, 1227 (9th Cir. 2009). Regardless, as explained above,
the ALJ did not use Plaintiff’s prior smoking habit to discredit his symptom claims.
Therefore, the ALJ’s mere mention of the fact that Plaintiff previously smoked was
not error or was harmless.

1 Plaintiff misreads the ALJ's decision. The ALJ made no finding on Plaintiff's
2 credibility. *See* AR 24; *see also* Soc. Sec. Ruling 16-3p (eliminating the term
3 "credibility" to "clarify that subjective symptom evaluation is not an examination
4 of an individual's character"), *available at* 2017 WL 5180304, at *1. Also, the ALJ
5 did not completely disregard Plaintiff's symptom claims but merely found they
6 were "not entirely consistent" with the record. AR 24; *see also Carmickle v.*
7 *Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008) ("Contradiction
8 with the medical record is a sufficient basis for rejecting the claimant's subjective
9 testimony.").

10 In reviewing the record, the ALJ noted Plaintiff's condition improved with
11 proper medication and smoking cessation. *See* AR 24; *see also Morgan v. Comm'r*
12 *of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999) (establishing it is reasonable
13 to rely on medical evidence showing a claimant's condition improved, even when
14 it contradicts his or her subjective complaints); *Thomas v. Barnhart*, 278 F.3d 947,
15 958–59 (9th Cir. 2002) (establishing it is permissible to consider medical evidence
16 concerning the nature, severity, and effect of the symptoms of which a claimant
17 complains). Ultimately, the ALJ found the record "supported . . . limitations in the
18 residual functional capacity, but not in excess of those noted herein."⁶ AR 24.

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20 ⁶ Contrary to Plaintiff's assertion, the ALJ did not "imply[]" she was discrediting
his symptom claims solely because they were unsubstantiated by medical evidence.
ECF No. 12 at 9 (citing AR 24); *see also Robbins v. Soc. Sec. Admin.*, 466 F.3d 880,

1 In context, it is clear the ALJ used neither Plaintiff's historical failure to take
2 his medications nor his prior smoking habit to discredit his symptom claims.
3 Instead, the ALJ considered those past facts—which are fairly part of the record she
4 was required to analyze—because once those past facts were removed, Plaintiff's
5 condition improved. *See* AR 24. Plaintiff's argument would produce absurd results
6 by prohibiting the mere mention of these topics, thereby depriving the parties and
7 decisionmakers of the reasonable inferences to be drawn from them.

8 After reviewing the record, it is apparent to the Court that substantial
9 evidence supports the ALJ's findings because the record contains enough relevant
10 evidence to persuade a reasonable person to view Plaintiff's symptoms claims the
11 way the ALJ did. In making her observations, the ALJ identified what parts of
12 Plaintiff's symptom claims are not credible and what evidence undermines them.
13 *See* AR 24. The ALJ's findings are sufficiently specific for the Court to conclude
14 the ALJ rejected Plaintiff's symptom claims on permissible grounds and did not

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16 883 (9th Cir. 2006) (prohibiting disregarding a claimant's testimony "solely
17 because it is not substantiated affirmatively by objective medical evidence"). The
18 ALJ's reference to "alleged medical records," while confusing, did not suggest she
19 thought Plaintiff's symptom claims lacked any affirmative, objective support. *See*
20 AR 24 ("In terms of the claimant's alleged medical records supplied a history of
multiple conditions requiring some surgical intervention prior to the application
date."). The ALJ found the record supported some limitations but Plaintiff's
symptom claims were "not entirely consistent" with the record. AR 24. This finding
was permissible. *See Carmickle*, 533 F.3d at 1161 ("Contradiction with the medical
record is a sufficient basis for rejecting the claimant's subjective testimony.").

1 discredit them arbitrarily. The ALJ properly executed her function of reviewing the
2 record, weighing the evidence, and resolving discrepancies and ambiguities. In sum,
3 the ALJ gave specific, clear and convincing reasons for rejecting Plaintiff's claims
4 about the severity of his symptoms. Therefore, the ALJ applied the proper legal
5 standard and substantial evidence supports her decision.

6 **B. The ALJ reasonably weighed the opinion of Plaintiff's examining**
7 **psychologist.**

8 In 2014, psychologist Frank M. Rosekrans, PhD, evaluated Plaintiff for
9 psychological and psychiatric symptoms. AR 837–44. Dr. Rosekrans diagnosed
10 Plaintiff with anxiety disorder and somatic symptom disorder. AR 838. Dr.
11 Rosekrans opined Plaintiff had severe limitations in his ability to “[p]erform
12 activities within a schedule, maintain regular attendance, and be punctual within
13 customary tolerances without special supervision”; “[c]ommunicate and perform
14 effectively in a work setting”; and “[c]omplete a normal work day and work week
15 without interruptions from psychologically based symptoms.” AR 839.
16 Additionally, Dr. Rosekrans opined Plaintiff had marked limitations in his ability
17 to “[u]nderstand, remember, and persist in tasks by following detailed instructions.”
18 AR 839. Dr. Rosekrans opined these limitations would persist throughout Plaintiff's
19 lifetime. AR 839.

20 The ALJ gave Dr. Rosekrans's opinion little weight because “it is not
supported by the examination findings,” “the longitudinal record does not support

1 [it],” and “the examination is a onetime evaluation and there are no other treatment
2 records or diagnoses to support a persistent condition.” AR 21.

3 There are three types of physicians: “(1) those who treat the claimant (treating
4 physicians); (2) those who examine but do not treat the claimant (examining
5 physicians); and (3) those who neither examine nor treat the claimant
6 (nonexamining physicians).” *Garrison v. Colvin*, 759 F.3d 995, 1012 (9th Cir.
7 2014) (quoting *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995)). “As a general
8 rule, more weight should be given to the opinion of a treating source than to the
9 opinion of doctors who do not treat the claimant.” *Id.* (quoting *Lester*, 81 F.3d at
10 830). “While the opinion of a treating physician is thus entitled to greater weight
11 than that of an examining physician, the opinion of an examining physician is
12 entitled to greater weight than that of a non-examining physician.” *Id.*

13 “To reject [the] uncontradicted opinion of a treating or examining doctor, an
14 ALJ must state clear and convincing reasons that are supported by substantial
15 evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir. 2017) (alteration in
16 original) (quoting *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194, 1198 (9th Cir.
17 2008)). “If a treating or examining doctor’s opinion is contradicted by another
18 doctor’s opinion, an ALJ may only reject it by providing specific and legitimate
19 reasons that are supported by substantial evidence.” *Id.* (quoting *Ryan*, 528 F.3d at
20 1198).

1 An ALJ may reject a doctor's opinion if it is brief, conclusory, and
2 inadequately supported by clinical findings. *Chaudhry v. Astrue*, 688 F.3d 661, 671
3 (9th Cir. 2012). An ALJ may reject a doctor's opinion if it contradicts his or her
4 own clinical notes or other recorded observations. *Bayliss v. Barnhart*, 427 F.3d
5 1211, 1216 (9th Cir. 2005). Indeed, an ALJ may reject a doctor's opinion if it is
6 internally inconsistent and inconsistent with other evidence in the record. *Morgan*,
7 169 F.3d at 602–03. Additionally, an ALJ may reject a doctor's opinion if he or she
8 has not seen the patient long enough to obtain a longitudinal picture of the relevant
9 impairments, opines on a matter not related to his or her area of specialization, and
10 presents no support for his or her opinion on the matter. *Holohan v. Massanari*, 246
11 F.3d 1195, 1202 n.2 (9th Cir. 2001).

12 Plaintiff argues the ALJ erred in weighing Dr. Rosekrans's uncontradicted
13 opinion. ECF No. 12 at 11–13. As a preliminary matter, the Court notes Plaintiff is
14 incorrect to characterize Dr. Rosekrans's opinion as uncontradicted. As the ALJ
15 noted, nonexamining medical consultants Jan L. Lewis, PhD and Carla van Dam,
16 PhD reviewed the record and opined Plaintiff had no greater than mild restrictions
17 and insufficient evidence existed to establish the presence of his mental health
18 claims. *See* AR 21–22, 95–96, 104–05. Thus, in reviewing the ALJ's decision to
19 give Dr. Rosekrans's opinion little weight, the Court requires specific and legitimate
20 reasons, rather than clear and convincing reasons, supported by substantial

1 evidence.⁷

2 First, Plaintiff argues the ALJ disregarded Dr. Rosekrans's statement that
3 Plaintiff "had a slight tendency to deny problems and present himself as free of
4 problems." AR 838; *see also* ECF No. 12 at 12. But the ALJ is not required to recite
5 every aspect of a medical opinion. And, Plaintiff takes this statement out of context:

6 [Plaintiff's Personality Assessment Inventory] was valid, although [his
7 score on the inconsistency scale] was high; he was a little inconsistent
8 in his answers. He had a slight tendency to deny problems and present
9 himself as free of problems. His highest scale was Health Concerns,
which is entirely reasonable since he is apparently disabled by health,
heart, problems. He is coping with it well, and staying up beat and not
depressed despite his condition.

10 AR 838.

11 In context, this statement does not undermine the ALJ's finding that Dr.
12 Rosekrans's opinion "is not supported by the examination findings." AR 21. As the
13 ALJ correctly noted, Dr. Rosekrans's own examination findings specified Plaintiff
14 was normal in all mental health categories. *See* AR 21–22, 840–41. Namely,
15 Plaintiff presented as normal in appearance, speech, attitude and behavior, mood,
16 affect, thought process and content, orientation, perception, memory, fund of
17 knowledge, concentration, and abstract thought. *See* AR 21–22, 840–41. When
18 asked to "[l]ist all mental health symptoms that affect [Plaintiff]'s ability to work,"

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20 ⁷ While Dr. Lewis and Dr. van Dam's opinions cannot by themselves constitute
substantial evidence to justify rejecting Dr. Rosekrans's opinion, *see Revels*, 874
F.3d at 664, as discussed above, the ALJ provided other valid reasons for doing so.

1 Dr. Rosekrans wrote only “[h]ealth problems” and “heart problems”—an area
2 outside his expertise as a psychologist. AR 838; *see also* AR 21; *cf.* 20 C.F.R.
3 § 416.927(c)(5) (authorizing considering the scope of specialization when
4 evaluating a medical opinion). Thus, the ALJ observed “it is unclear as to what [Dr.
5 Rosekrans] relied in identifying restrictions, as the report gives no indication as to
6 what specifically supported restrictions.” AR 22; *cf.* 20 C.F.R. § 416.927(c)(3)
7 (authorizing considering supportability by medical evidence and the quality of
8 explanation provided when evaluating a medical opinion). The ALJ did not err in
9 this aspect of weighing Dr. Rosekrans’s opinion.

10 Second, Plaintiff argues the ALJ failed to explain how Plaintiff’s lack of
11 mental health complaints or treatment in other portions of the record affects the
12 legitimacy of Dr. Rosekrans’s opinion. ECF No. 12 at 12–13. But the ALJ was not
13 required to draw this connection. It was enough for the ALJ to note, as a secondary
14 reason for giving Dr. Rosekrans’s opinion little weight, that other portions of the
15 record did not substantiate Plaintiff’s alleged mental health limitations. *See* AR 21–
16 22; *cf.* 20 C.F.R. § 416.927(c)(4) (authorizing considering consistency with the
17 record as a whole when evaluating a medical opinion). As the ALJ explained,
18 Plaintiff “received no mental health diagnosis during other exams or treatments
19 throughout the medical records, he denied anxiety or other symptoms during
20 subsequent evaluations, and he did not seek mental health treatment throughout the

1 time period at issue.” AR 21. Moreover, Plaintiff’s “own testimony suggested a
2 broad array of activities despite his suggested anxiety.” AR 22. Notably, Plaintiff
3 “had no communication issues at the hearing.” AR 22. The ALJ did not err in this
4 aspect of weighing Dr. Rosekrans’s opinion.

5 Finally, Plaintiff argues the ALJ could not rely on the fact that Dr.
6 Rosekrans’s opinion was a onetime evaluation because it is only relevant to
7 determining he was an examining psychologist and does not provide a basis for
8 rejecting his opinion. ECF No. 12 at 13. Plaintiff is incorrect. In weighing Dr.
9 Rosekrans’s opinion, it was proper for the ALJ to consider the length, frequency,
10 nature, and extent of his examining relationship with Plaintiff. *See* AR 21; *cf.* 20
11 C.F.R. § 416.927(c)(2)(i)–(ii) (authorizing considering these factors when
12 evaluating a medical opinion). Again, the ALJ did not err.

13 Considering all, the ALJ provided specific and legitimate reasons for giving
14 Dr. Rosekrans’s opinion less deference. Additionally, substantial evidence supports
15 the ALJ’s reasons for doing so. The record contains enough relevant evidence to
16 persuade a reasonable person to view Dr. Rosekrans’s opinion the way the ALJ did.
17 The ALJ’s decision on this issue was rational and Plaintiff’s mere disagreement
18 with it does not mean the Court should disturb it. “Where evidence is susceptible to
19 more than one rational interpretation, it is the ALJ’s conclusion that must be
20 upheld.” *Luther v. Berryhill*, 891 F.3d 872, 875 (9th Cir. 2018) (quoting *Burch v.*

1 *Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005)). Therefore, the ALJ applied the proper
2 legal standard and substantial evidence supports her decision.

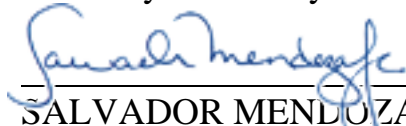
3 In sum, the Court finds the record contains substantial evidence from which
4 the ALJ properly concluded, when applying the correct legal standards, that
5 Plaintiff does not qualify for social security benefits.

6 Accordingly, **IT IS HEREBY ORDERED:**

- 7 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.
- 8 2. The Commissioner's Motion for Summary Judgment, **ECF No. 13**, is
9 **GRANTED**.
- 10 3. The ALJ's decision is **AFFIRMED**.
- 11 4. The Clerk's Office is directed to **ENTER JUDGMENT** in the
12 Commissioner's favor.
- 13 5. All pending motions are **DENIED AS MOOT**.
- 14 6. All hearings and other deadlines are **STRICKEN**.
- 15 7. The Clerk's Office is directed to **CLOSE** this file.

16 **IT IS SO ORDERED.** The Clerk's Office is directed to enter this Order and
17 provide copies to all counsel.

18 **DATED** this 25th day of January 2019.

19 
20 SALVADOR MENDOZA, JR.
United States District Judge